

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-5025

To Be Argued By
PAUL E. DAHLMAN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SEAFARER FIBER GLASS YACHTS, INC.,

Debtor-Appellant,

-against-

THE STATE OF NEW YORK, DEPARTMENT OF TAXATION
AND FINANCE, SALES TAX BUREAU,

Claimant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR CLAIMANT-APPELLEE

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Preliminary Statement

Appellant is a Chapter XI debtor seeking to avoid liability for sales tax on pre-petition sales of boats, on the theory that sailboats are motor vehicles and sales thereof are exempt from sales tax under Section 1117 of the New York Tax Law. This brief supports the propriety of the District Court's action of rejecting appellant's argument.

Question Presented

1. Does the term "motor vehicle," in the context in which it is defined and used -- a comprehensive law governing land transportation -- comprehend a sailboat, so as to exempt sales of boats from sales tax?

The District Court held it does not.

Facts

The New York State Department of Taxation and Finance ("Tax") filed an amended claim for \$116,510.90 for past due sales tax owed by Seafarer Fiber Glass Yachts, Inc. ("Seafarer"), a Chapter XI debtor (36a). Seafarer's previous motion expunge Tax's original claim was then deemed to apply to the amended claim (23a et seq.).

The claim arose out of Seafarer's sales of fiber glass sailboats, allegedly to non-residents of New York State (19a). There is no dispute as to the calculations of sales tax, if applicable.

A hearing was held in Bankruptcy Court on Seafarer's motion on January 17, 1977 (23a). Post-hearing memoranda were

also submitted, after which the referee (Hon. William J. Rudin, B.J.) issued his memorandum and order granting Seafarer's motion (61a). The referee held that, based on one of the dictionary definitions of "highway," the Long Island Sound was a highway within the context of N.Y. Veh. & T.L. § 125, and, therefore, that the boats in question were "motor vehicles" entitled to an exemption from sales tax pursuant to N.Y. Tax L. § 1117(a). Tax appealed to the District Court from this order.

Decision Below

District Judge George C. Pratt reversed the order of the referee in a decision and order dated September 1, 1977 (70a). He analyzed the definition of "motor vehicle" in N.Y. Veh. & T.L. § 125 in the context of the comprehensive statute in which it is found and to which it was intended to apply -- the entire New York Vehicle and Traffic Law. He concluded, after an exhaustive discussion of the areas to which the law applies, that § 125 could not reasonably be construed so as to comprehend any means of transportation other than those operated on land. He, therefore, reversed the ruling on the availability of the exemption from sales tax in N.Y. Tax L. § 1117, and remanded the matter to the Bankruptcy Court for further fact-finding on the other issues involved.

Statutes Involved

N.Y. Tax L. § 1117(a):

Certain sales of motor vehicles

(a) Receipts from any sale of a motor vehicle shall not be subject to the retail sales tax imposed under subdivision (a) of section eleven hundred five, despite the taking of physical possession by the purchaser within this state, provided that the purchaser, at the time of taking delivery:

(1) is a nonresident of this state,

(2) has no permanent place of abode in this state,

(3) is not engaged in carrying on in this state any employment, trade, business or profession in which the motor vehicle will be used in this state, and

(4) prior to taking delivery, furnishes to the vendor: any affidavit, statement or additional evidence, documentary or otherwise, which the tax commission may require to assure proper administration of the tax imposed under subdivision (a) of section eleven hundred five.

N.Y. Veh. & T.L. § 125:

Motor vehicles

Every vehicle operated or driven upon a public highway which is propelled by any power other than muscular power, except (a) electrically-driven invalid chairs being operated or driven by an invalid, (b) vehicles which run only upon rails or tracks, and (c) snowmobiles as defined in article forty-seven of this chapter. For the purposes of title four, the term motor vehicle shall exclude fire and police vehicles. For the purposes of titles four and five the term motor vehicle shall exclude farm type tractors used exclusively for agricultural purposes, or for snow plowing, other than for hire, farm equipment, including self-propelled machines used exclusively in growing, harvesting or handling farm produce, and self-propelled caterpillar or crawler-type equipment while being operated on the contract site.

ARGUMENT

SINCE SAILBOATS ARE NOT MOTOR VEHICLES AS DEFINED IN N.Y. VEH. & T.L. § 125, THEIR SALES CAN NEVER BE EXEMPT FROM SALES TAX PURSUANT TO N.Y. TAX L. § 1117.

Seafarer seeks to avoid the imposition of sales tax on the curious grounds that its sailboats are "motor vehicles." New York Tax Law § 1117 exempts certain sales of

"motor vehicles" as that term is defined in New York Vehicle & Traffic Law § 125. Rather, the sales are subject solely to the general imposition of tax found in N.Y. Tax L. § 1105.

Not only does [redacted] cravene the case law and violate all sound rules of construction, but it strains credulity to advance this argument, as it is abundantly clear that the Legislature did not include, or intend to include, water vessels in the scope of the Vehicle & Traffic Law.

The Vehicle and Traffic Law regulates but one genre of transportation -- on land.* The District Court amply demonstrated this by cataloguing a few of the many provisions of the Law that shatter any delusions to the contrary. That inventory will not be repeated here since a quick perusal of

* The one exception is the new Article 48 of the Veh. & T.L., added in 1973, required registration of motorboats with the Department of Motor Vehicles. Previously, the Office of Parks and Recreation had been responsible, pursuant to the N.Y. Navigation Law. If the boats had been motor vehicles all along, there would have been no need for the change since registration would always have been with the Department of Motor Vehicles.

the Law itself is convincing.*

The principle is so self-evident that only one reported case has been found that even discusses the applicability of the Law to transportation other than on land. In Munch & Romeo, Inc. v. Caton, 1 CCH Aviation Cases 644 (Co. Ct. Nassau Co. 1936), Judge Johnson did not even need to analyze the topic at length, as there was no question but that the Law did not apply to airplane traffic, and did apply only to land traffic.

Be that as it may, Seafarer continues to make a distorted linguistic argument, in a vain attempt to squeeze into the words of § 125, by attempting to convince the Court that the Long Island Sound is a highway, and that, therefore, sailboats are motor vehicles because they traverse the highways.

* It is helpful to compare Tax L. §§ 1115(a)(14) and 1115(a)(18), however. Section 1115(a)(14) also refers to Veh. & T.L. § 125 for the purposes of a tax exemption, while § 1115(a)(18), dealing with yet another exemption, reads in part, " *** [T]he sale of boats, snowmobiles, or motor vehicles, except such sales of motor vehicles within the exemptions of [§ 1115(a)(14)]." It is clear that the Legislature never considered boats to be motor vehicles.

The New York Court of Appeals has on several occasions chastised the use of the term highway in a broader and technically not incorrect in the etymological sense when the context in which it was used dictated that its commonly understood meaning of public ways on land was clearly intended. People ex rel. Hudson & M. R.R. Co. v. State Tax Comm., 203 N.Y. 119, 128 (1911); In re Burns, 155 N.Y. 23, 29-30 (1898). In Hudson, the Court, in ruling that an exception to the general taxing statute (as here) did not apply, said:

"Of course, the Hudson River is a highway in the broad sense of that term ***. But navigable streams do not fall within the ordinary nomenclature of highways unless the intent to include them is apparent. None such appears in the statute."

And in Burns the Court held that whether or not a waterway was a highway must be determined from the context, and applying the doctrine of Noscitur A Sociis ("one is known by his companions") decided that since "highway" was used in conjunction with terms such as "alley," "road" and "street," and not "canal" or "river," that "highway" did not comprehend waterways.

The same approach is evident here. "Public Highway" is defined in Veh. & T.L. § 134 as "[A]ny highway, road, street, avenue, alley, public place, public driveway or any other public way." Conspicuous in their absence are any terms even remotely suggesting waterways.

The United States Supreme Court has agreed in the case most closely analogous to this. Mc Boyle v. United States, 283 U.S. 25 (1931) (holding that a federal act proscribing theft of motor vehicles did not apply to aircraft since they did not operate on land). See also, Diguilio v. Rice, 27 Cal. App. 2d Supp. 775, 778-780, 70 P. 2d 717 (1937) (reaching the same result).

Indeed, the Supreme Court of North Carolina has ruled in accord on the precise question presented herein in Hatteras Yacht Co. v. High, 265 N.C. 653, 144 S.E. 2d 821 (1965). The statute there provided for the imposition of a lesser sales tax on certain motor vehicles which were defined as "[A]ny vehicle which is self-propelled and designed primarily for use upon the highways." N.C.G.S. § 105-164.4. A unanimous court held that the sailboats were not motor vehicles and were accordingly subject to the standard tax, although they were vehicles and were not muscularly propelled, because they did not travel on the public highways.

Seafarer advances one final argument against the imposition of the sales tax. It claims that it would be unfair since cars sales can be entitled to the exemption, and attempts to raise an Equal Protection attack (nowhere pleaded or raised below) on those grounds. There is no Equal Protection problem. In fact, Seafarer's own arguments cut against it.

Millions of people rely on the automobile for basic transportation needs. Sailboats are for the most part luxury and recreational items. They serve fundamentally different roles in society. With this difference in mind, there is no reason why any special exemptions given to motor vehicles need be extended to sailboats, or diamond rings for that matter.

CONCLUSION

THE ORDER OF THE DISTRICT COURT
SHOULD BE AFFIRMED.

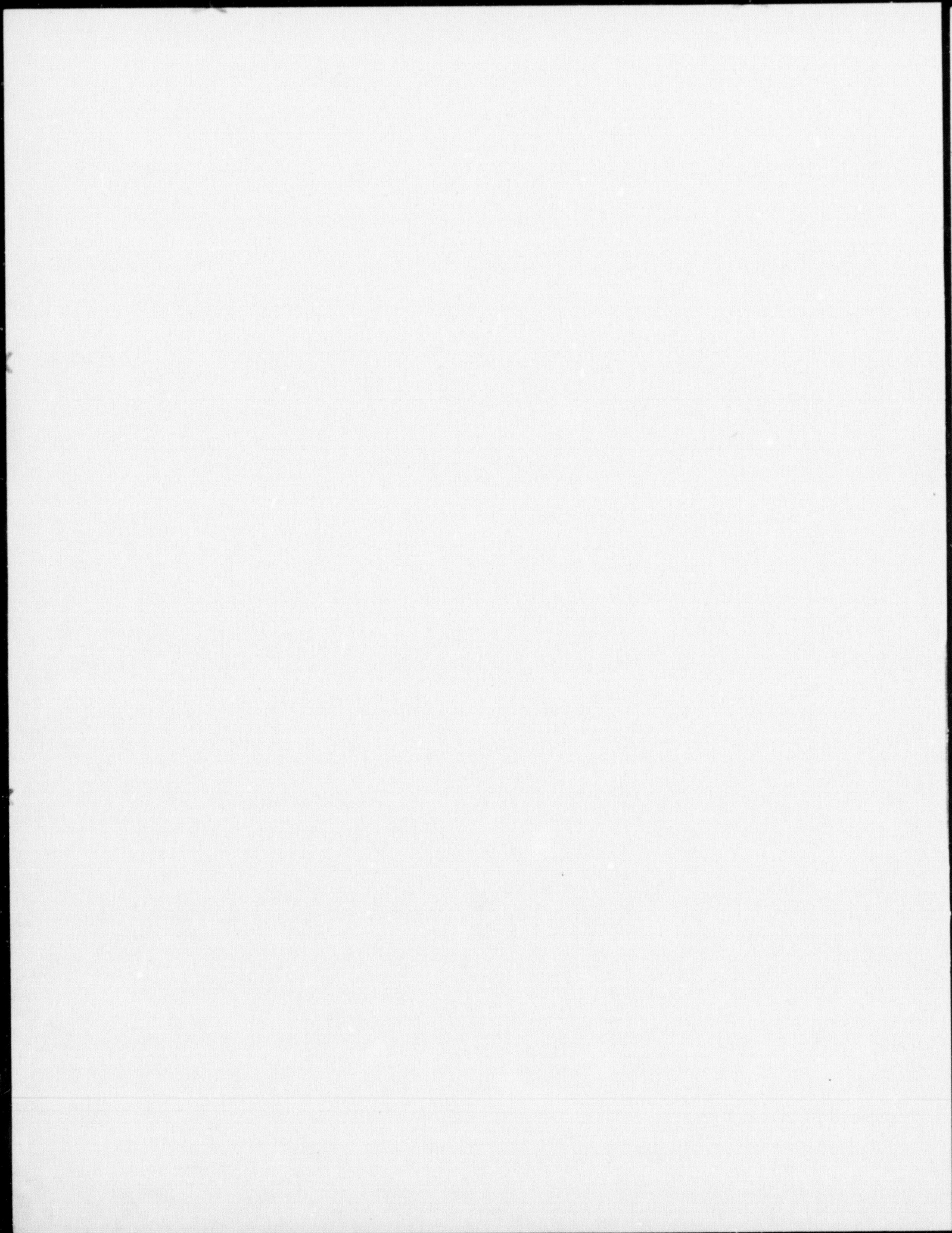
Dated: New York, New York
January 9 , 1978

Respectfully submitted,

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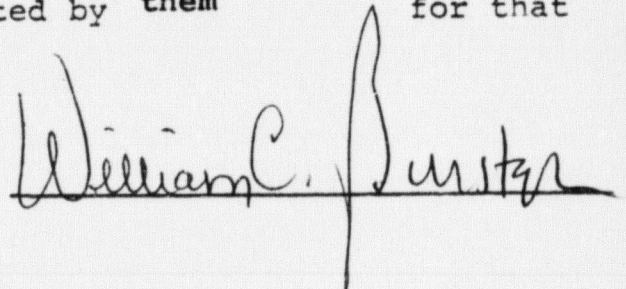
STATE OF NEW YORK)
 : SS.:
COUNTY OF NEW YORK)

 WILLIAM BURSTEN , being duly sworn, deposes and
says that he is employed in the office of the Attorney
General of the State of New York, attorney for appellee
herein. On the 11th day of January , 1978 , he served
the annexed upon the following named persons :

Battle, Fowler, Lidstone, Jaffin, Pierce & Kheel
280 Park Avenue
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Attorney in the within entitled proceeding by depositing
a true and correct copy thereof, properly enclosed in a post-
paid wrapper, in a post-office box regularly maintained by the
Government of the United States at Two World Trade Center,
New York, New York 10047, directed to said Attorney at the
address within the State designated by them for that
purpose.

Sworn to before me this
11th day of January , 1978




Dep. Assistant Attorney General
of the State of New York